OAH 48-0325-30140

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

Minnesota Voters Alliance and Donald Huizenga,

Complainants,

vs.

Anoka-Hennepin School District,

Respondent.

ORDER ON CROSS MOTIONS FOR SUMMARY DISPOSITION

The above-entitled matter is before the panel of Administrative Law Judges on remand from the Minnesota Court of Appeals on the Complainants' allegations that the Anoka-Hennepin School District violated Minn. Stat. § 211A.02 in connection with a November 2011 levy referendum election.[1]

The parties filed dispositive motions on June 27, 2014, and responses to the motions on July 11, 2014. The Respondent also filed a Motion to Strike on July 9, 2014, and the Complainants filed a Response in Opposition to the District's Motion to Strike on July 11, 2014. Oral argument on the motions was heard on July 24, 2014, and the record with respect to the motions closed on that day.[2]

Erick G. Kaardal, Mohrman, Kaardal & Erickson, P.A., represented the Minnesota Voters Alliance and Donald Huizenga (Complainants).

Jeanette M. Bazis and Katherine M. Swanson, Greene Espel, PLLP, represented the Anoka-Hennepin School District (Respondent).

Based upon all of the files, records, and proceedings herein, and for the reasons set out in the attached Memorandum, the assigned panel of Administrative Law Judges makes the following:

[1] *Minnesota Voters Alliance, et al*., *v. Anoka Hennepin School District,* 2013 WL 6725847 (Minn. Ct. App. Dec. 23, 2013) (unpublished opinion).

[2] Administrative Law Judge Steve Mihalchick presided over the July 24, 2014, oral argument hearing. Judges Kohl and Bouman listened to the digital recording of the oral argument.

ORDER

IT IS ORDERED as follows:

1. That Respondent's Motion to Strike the portion of Complainants' Summary Disposition Memorandum that exceeds 25 pages is DENIED.

2. That the Complainants' Motion for Summary Disposition is DENIED.

3. That the Respondent's Motion for Summary Disposition is GRANTED.

Dated: August 25, 2014

_s/Steve M. Mihalchick_____
STEVE M. MIHALCHICK
Presiding Administrative Law Judge

_s/Stacy Bouman_____
STACY BOUMAN
Administrative Law Judge

_s/James Kohl_____
JAMES KOHL
Administrative Law Judge

NOTICE

Under Minn. Stat. § 211B.36, subd. 5, this Order is the final decision in this matter and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. § § 14.63 to 14.69.

MEMORANDUM

Procedural History

This case concerns a brochure created and disseminated by Respondent Anoka-Hennepin County School District (School District or District) that informed voters about the consequences of approving or rejecting three levy questions on the November 2011 ballot.

On November 2, 2012, the Minnesota Voters Alliance and Donald Huizenga filed a complaint with the Office of Administrative Hearings alleging that the School District violated Minn. Stat. §§ 211A.02 and 211B.06 of the Fair Campaign Practices Act by failing to report its expenditures related to creating and disseminating the brochure, and by making false statements in the brochure. The Complainants also alleged generally that the District wrongfully used public moneys to create and distribute the brochure.

Following a *prima facie* determination, both Parties moved for summary disposition. By Order dated April 1, 2013, the assigned Administrative Law Judge dismissed the complaint, concluding that both the Sections 211A and 211B claims were barred by the one-year statute of limitations.[3]

On appeal, the Minnesota Court of Appeals affirmed the dismissal of the Section 211B.06 claim and remanded the Section 211A.02 claim for further proceedings to address the merits of the claim.[4]

Both parties have now moved for summary disposition on the remaining Section 211A.02 claim. Both parties maintain that there are no genuine issues of material fact in dispute and both claim they are entitled to judgment in their favor as a matter of law.[5]

Background

In September 2011, the Anoka-Hennepin School Board unanimously passed a resolution to present three levy-funding questions to voters in the election of November 8, 2011. The ballot questions asked voters whether to: (1) renew an existing levy providing $1,044 per student per year for the next ten years; (2) approve a levy of $3 million each year for ten years for technology; and (3) approve a levy of $12 million per year for ten years as a stop-gap measure if the legislature fails to approve inflationary funding.[6]

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[3] *Minnesota Voters Alliance, et al*., *v. Anoka Hennepin School District,* OAH 8-0325-30140, Order on Cross Motions for Summary Disposition (April 1, 2013), *citing* Minn. Stat. § 211B.32, subd. 2.
[4] *Minnesota Voters Alliance, et al*., *v. Anoka Hennepin School District,* 2013 WL 6725847 (Minn. Ct. App. Dec. 23, 2013) (unpublished opinion) at *3.
[5] *See* Complainants' Memorandum of Law in Support of Summary Disposition on Remand (June 27, 2014) at 3; Respondents' Memorandum in Support of its Renewed Motion for Summary Judgment (June 27, 2014).
[6] Affidavit (Aff.) of Mary Olson at ¶ 7.

The School District created a brochure to inform voters about the ballot questions and the effects of approving or rejecting each levy request.[7] The District hired a company to print and mail the brochures to all addresses in the district. The School District posted an electronic version of the brochure on its website on October 27, 2011, and the printing company mailed the brochures to 81,235 households in the district on October 31, 2011. In total, the District spent $15,935.13 to print and mail the brochure.[8]

A copy of the brochure is attached to this decision as Attachment A.

At around the same time as it distributed the brochure (Attachment A), the School District distributed to the same households a mailing that explained the tax impact of approving or rejecting each of the 2011 levy questions and noted in bold that "Passage of Question 2 and 3 will result in an increase in your property taxes."[9] A copy of the sample ballot was included in the material and it likewise indicated that voting yes on these ballot questions would result in property tax increases.[10]

Motion Standard

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.[11] The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.[12] A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.[13]

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case.[14] The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.[15] The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.[16]

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[7] Complaint Exhibit (Ex.) 1.
[8] Aff. of M. Olson at ¶¶ 17-27, Exs. E-K.
[9] *Id*. at ¶ 10, Ex. C.
[10] *Id*., Complainants' Ex. 2.
[11] *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); Minn. R. 1400.5500K; Minn. R. Civ. P. 56.03.
[12] *See* Minn. R. 1400.6600.
[13] *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984).
[14] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid-America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).
[15] *Id*.; *Murphy v. Country House, Inc*., 240 N.W.2d 507, 512 (1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. Ct. App. 1988).
[16] *Carlisle*, 437 N.W.2d at 715 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

When considering a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party.[17] All doubts and factual inferences must be resolved against the moving party.[18] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.[19]

I. The Complainants' Motion for Summary Disposition

The issues before the panel are: (1) whether the School District met the definition of a "committee" under Minn. Stat. § 211A.01, subd. 4, by having acted to promote the 2011 levy referendum ballot questions through the brochure it developed and disseminated; and (2) if so, whether it was required to file campaign finance reports in accordance with Minn. Stat. § 211A.02.

The Complainants make several arguments in support of their motion for summary disposition. Each is discussed below.

A. Lack of Rebuttal Affidavit

As an initial matter, the Complainants asserted during oral argument on the cross motions for summary disposition that they are entitled to summary disposition as a matter of law because the School District failed to submit an affidavit supporting its position in its response to the Complainants' motion for summary disposition. The Complainants submitted affidavits from Andy Cilek, Executive Director of Minnesota Voters Alliance, and Donald Huizenga, a district resident, in support of their motion for summary disposition. Both individuals attest that they viewed the School District's material to be promotional.

Because the School District did not submit an affidavit of an "average voter" disputing the testimony of Cilek and Huizenga, the Complainants argue the School District has failed to meet its burden under Minn. R. Civ. P. 56.03 and has offered only general averments in response to the Complainants' motion.[20] The Complainants assert that the rules governing summary judgment (and by extension summary disposition) are clear that when such a motion is made and supported with an affidavit, the non-moving party must present specific facts showing there is a genuine issue of material fact for trial. The non-moving party may not rest upon mere averments or denials of the adverse party's pleadings.[21] The Complainants maintain that the School District's failure to rebut their evidence by submitting an affidavit of an "average voter" stating that the District's material is not promotional mandates a finding that there are no

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[17] *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. Ct. App. 1984).
[18] *See*, *e.g.*, *Celotex*, 477 U.S. at 325; *Thiele*, 425 N.W.2d at 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Thompson v. Campbell*, 845 F. Supp. 665, 672 (D. Minn. 1994).
[19] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).
[20] *Thiele*, 425 N.W.2d at 583; *Hunt*, 384 N.W.2d at 855; *Murphy* 240 N.W.2d at 512 (1976); *Carlisle*, 437 N.W.2d at 715).
[21] Minn. R. Civ. P. 56.05; *see also, J.J. Case Credit Corp. v. Foster*, 384 N.W. 2d 610, 612 (Minn. Ct. App. 1986) (holding that the trial court properly granted summary judgment for the moving party where the non-moving party failed to file affidavits or other competent evidence in response).

material facts in dispute on the issue of promotion and that Complainants are entitled to summary disposition as a matter of law.

The panel finds the Complainants' argument unpersuasive. Whether an "average voter" or "reasonable person" would find the School District's brochure to be promotional can be objectively determined. It is not dependent on the testimony of witnesses as to how they interpreted the material or the effect the material had on them. In fact, the Complainants acknowledged in their memorandum in support of summary disposition that testimony of individual voters would add little to a determination of whether an "average voter" would view the brochure as promotional.[22] The Respondent's failure to submit an affidavit of an "average voter," therefore, is not decisive of the issue and does not warrant granting summary disposition in favor of the Complainants.

In *Schmitt v. McLaughlin,*[23] for example, a losing candidate alleged that, by using the initials "DFL" on campaign material, his opponent falsely implied that he was endorsed by the DFL party. The Minnesota Supreme Court held as a matter of law that the "use of the initials 'DFL' would imply to the *average voter* that [the candidate] had the endorsement or, at the very least, the support of the DFL party."[24] Moreover, despite testimony from witnesses that they did not interpret the initials "DFL" as implying party endorsement, the Court indicated that the determination as to whether material implies a person has the endorsement or support of a political party is a matter that can be objectively determined.[25]

Similarly, in *Federal Election Comm'n v. Wisconsin Right to Life,*[26] the United States Supreme Court rejected a test based on the intent of the speaker for purposes of distinguishing express advocacy from issue advocacy. The Court instead adopted an objective test and concluded that a court should find that an advertisement is the functional equivalent of express advocacy only if the advertisement is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.[27]

The panel concludes that, just as the reasonable person standard is an objective standard that does not vary with a specific person's state of mind, the "average voter" standard may be objectively determined by the panel and is not dependent on the testimony of specific individuals.[28] The School District's decision not to file affidavits of individuals attesting to the fact that they did not view the District's brochure to be promotional does not mandate a determination that there are no facts in dispute and

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[22] *See* Complainants' Memorandum of Law in Support of Summary Disposition on Remand (June 27, 2014) at 22.
[23] 275 N.W.2d 587 (Minn. 1979).
[24] *Id*., 275 N.W.2d at 591 (emphasis added).
[25] 275 N.W.2d at 591.
[26] 551 U.S. 449 (2007).
[27] *Id*. at 451.
[28] *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995). (The reasonable person standard is an objective standard based on the totality of the circumstances. It does not vary with a particular person's subjective state of mind.)

that the Complainants are entitled to judgment as a matter of law. Moreover, given that the two affidavits submitted by the Complainants are from the Complainants themselves, their interpretation that the material was promotional may not be fairly representative of the "average voter."

The Complainants' motion for summary disposition on this ground is denied.

B. Use of Taxpayer Funds and Lack of Opposing Viewpoints

The Complainant argues next that the District "wrongfully spent public taxpayer funds" to prepare and mail the brochure regarding the 2011 levy referendum.[29] The Complainants assert further that, by using taxpayer funds to present only one side of the ballot question, the School District engaged in suppression of speech or "viewpoint discrimination."[30] According to the Complainants, by failing to "invite opposing viewpoints onto the campaign material" the District came "dangerously close" to suppressing the opposition's First Amendment rights to political speech.[31]

The Minnesota Supreme Court has yet to determine whether public funds may be expended to advocate for only one side of a ballot question.[32] That question as well as the Complainants' challenges to the constitutionality of the School District's conduct are beyond the scope of this hearing and are instead within the exclusive province of the judicial branch to resolve.[33] Accordingly, the Complainants' constitutional claims are noted for the record and preserved for possible appeal.

C. Whether Act of Placing Referendum Questions on the Ballot was Promotional

The Complainants also argue that by placing the levy referendum questions on the ballot, the School District "promoted" the ballot questions and thereby met the definition of a "committee" for purposes of Minn. Stat. ch. 211A. The Complainants point out that the last sentence of Minn. Stat. § 211A.01, subd. 4, states that "promoting" a ballot question "includes efforts to qualify or prevent a proposition from qualifying for placement on the ballot." Because the District placed the referendum questions on the ballot, the Complainants assert that the plain meaning of subdivision 4 deems that action to be promotional.

School districts are statutorily obligated to call for elections on school bond referenda.[34] Under the Complainants' reading of the statute, school districts would, by operation of law, be committees subject to campaign finance reporting requirements simply by fulfilling their legal obligation to call for a vote on bonding matters.

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[29] *See* Complainants' Memorandum of Law in Support of Summary Disposition on Remand at 4.
[30] *Id*. at 32.
[31] *Id*. at 30.
[32] *See Abrahamson v. St. Louis County Sch. Dist*., 819 N.W.2d 129, 135 (Minn. 2012).
[33] *See, Neeland v. Clearwater Memorial Hospital*, 257 N.W.2d 366, 369 (Minn.1977); *In re Rochester Ambulance Service*, 500 N.W.2d 495, 499-500 (Minn. Ct. App. 1993).
[34] Minn. Stat. §§ 123B.62; 475.52, subd. 5; and 475.58.

This identical argument was raised and rejected in *Abrahamson v. St. Louis County School District,*[35] and this panel agrees with the reasoning set forth in the *Abrahamson* panel's decision. The panel concludes that "qualifying" a proposition for placement on a ballot is different from the legal obligation to require a vote on an issue. The word "qualify" implies affirmative lobbying efforts on behalf of a group to get something not otherwise on the ballot before the voting public. For example, gathering signatures on a petition to get a candidate's name or proposition on the ballot would be an act of qualifying an issue for placement on the ballot. In contrast, the legal requirement that school districts place referenda matters on the ballot does not require lobbying or promotion of an agenda. Rather, a school district is simply complying with a legislative directive to obtain voter approval.

Therefore, the panel will not hold that the School District's act of placing the referendum on the ballot, which it is obligated to do, amounted to promotion of the ballot question. The panel finds that the sentence at issue in the statutory definition of "committee" more aptly applies to *ad hoc* citizen groups that campaign to qualify a proposition for placement on the ballot (or prevent a proposition from qualifying for placement on the ballot), rather than school districts that are statutorily required to place bond referendum questions on the ballot.

The Complainants' motion for summary disposition based on this argument is denied.

D. Whether the School District's Brochure was Objectively Promotional

Finally, the Complainants assert that the content of the School District's brochure promoted passage of the levy referendum rendering the District a "committee" for purposes of the campaign finance reporting requirements of chapter 211A. The Complainants contend that the lack of opposing viewpoints in the brochure and the emphasis on the positive outcomes should the referendum questions pass rendered the brochure a one-sided effort to advocate in favor of the levy requests. The Complainants identified particular statements in the brochure that they maintain may be interpreted only as promotional, including:

● the image of a checked box next to the phrase "Vote November 8";

● the list of positive outcomes should the referendum questions pass highlighted in bold (e.g., "reasonable class sizes"; "specialist teachers"; "no tax increase"; "updated technology for teachers");

● the list of negative outcomes should the referendum questions fail (e.g., "the district will cut $48 million from the budget"; "increase class sizes"; "eliminate more than 550 teachers"; "cut elementary art, music and physical education teachers by 50 percent");

[35] OAH 65-0325-21677, Order on Motion to Dismiss and Motion for Summary Disposition (August 2, 2013) at 15-17.

● the statement that "large-scale cuts" would "require sacrificing or at least compromising cherished and long time assumptions about what are necessary components of a good education"; and

● predictions of how students and teachers will feel if the referendum questions fail (e.g., "students and staff will continue to be frustrated with unreliable and inefficient computers for daily work"; "students will not gain the technology skills needed for success in college and the workplace").

In addition, the Complainants assert that the School District misrepresented the average state funding increases over the last 10 years. In the brochure, the District states that "state funding increases have averaged only 1 percent per year over the past 10 years" while the District's costs of providing educational programs and services have increased "roughly 2.5% to 3% per year."[36] According to the Complainants, a review of the District's June 2011 audit report indicates that state funding averaged about 3.2% per year over the past 10 years.[37] The Complainants assert that the District intentionally misled the electorate in order to promote the passage of the levy requests.

The Complainants argue that the identified statements in the District's brochure and the lack of opposing viewpoints demonstrate that the District went beyond informing the electorate about the levy referendum questions to advocating for passage of the ballot questions. As a result, the Complainants contend that the School District acted as a "committee" and was, therefore, required to report its expenditures pursuant to Minn. Stat. § 211A.02.

This argument will be considered further in the Analysis section below.

II. The School District's Response to Complainants' Motion for Summary Disposition and the District's Motion for Summary Disposition

The School District contends that it did not promote or expressly advocate for passage of the ballot questions at issue. The District argues that it has a duty to inform voters about the effects of approving or rejecting a proposed levy question.[38] It concedes that this responsibility does not include express advocacy for a favorable vote.[39] It maintains, however, that its brochure contained truthful, fair, informational material about the consequences of the failure or success of the levy questions that did not rise to the level of "promoting" a ballot question so as to trigger the reporting requirements of Section 211A.02.

[36] Complaint Ex. 1 (Question 3 "Background Information").
[37] Complainants' Memorandum of Law in Support of Summary Disposition on Remand at 12-14; 26-29.
[38] Op. Att'y Gen. 159a-3, at 3-5 (May 24, 1966) (school board "may expend a reasonable amount of school district funds to apprise the voters in the district of facts pertinent to [a bond] proposal.")
[39] *Id*. *citing Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills Township*, 98 A.2d 673 (N.J. 1953) (school board's exhortations to "Vote YES" along with "over-dramatized" "dire consequences of the failure to do so" in brochure regarding bond referendum election constituted prohibited express advocacy in favor of a "yes" vote).

For example, with respect to Question 1, the School District stated in the brochure that if the levy referendum passes, the District will renew a levy of $1,044 per student for ten years, which is approximately $48 million per year, depending on enrollment.[40] The brochure states that if Question 1 does not pass, the District will cut $48 million from its budget.[41] The brochure also states that if Question 1 does pass, the District will maintain current class size and programs, but if Question 1 does not pass, it will "[i]ncrease class size by 10 students . . . ."[42] The brochure states that if Question 1 passes, the District would have "[e]lementary art, music, physical education and media taught by specialist teachers."[43] The brochure states that if Question 1 does not pass, the District will "[c]ut elementary art, music and physical education teachers by 50 percent."[44]

The consequences of approving or disapproving the two other levy questions were presented in a similar fashion.[45] For example, the brochure states that if Question 2 passes, the School District will be able to "provide equitable student access to computers, provide updated technology for teachers, and provide schools with wireless internet access." The brochure stated further that if Question 2 does not pass, "aging computers will continue to fail and students and staff will continue to be frustrated with unreliable and inefficient computers."[46] With respect to Question 3, the brochure states that if Question 3 passes, the School District will be able to continue current educational programs and services. The brochure states that if Question 3 does not pass, the District will need to make cuts each year to balance the budget.[47] Finally, the brochure indicates that approval of Questions 2 and 3 will result in higher property taxes and it lists a website where readers may find tax estimates based on a specific home's value.[48]

The District argues that the information in the brochure is precisely what was presented to the school board and the public by the District's Chief Financial Officer, Michelle Vargas, at the Board's regular meeting on August 22, 2011, and at subsequent public meetings in September 2011.[49] Ms. Vargas explained that if the referendum levy was not renewed and the School District lost $48 million in annual funding, the District would have to implement a number of budget cuts beginning in the 2013-14 school year. According to Ms. Vargas, the District would need to cut approximately 705 staff positions, including about 20 percent of its teachers, and dramatically increase fees for after-school activities and athletics. Ms. Vargas estimated that class sizes would

[40] Complaint Ex. 1.
[41] *Id*.
[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] Aff. of M. Olson at ¶ 9, Exs. A and B; Aff. of M. Vargas, Exs. A-C. The Complainants object to the School District's characterization that it was informing "voters" about the ballot questions at these meetings as the School Board did not approve the levy questions for the ballot until September 26, 2011. *See* Complainants Response Memorandum at 5-6.

increase by approximately 10 students, various remedial programs would be eliminated, and four elementary schools and a middle school would close.[50] Ms. Vargas also described how the School District would use the funds and how residents' taxes would be impacted if voters approved technology and operating levies (Questions 2 and 3).[51]

The School District also argues that the campaign financial reporting requirements do not apply because the District's expenditures in creating and disseminating the brochure are authorized by law and therefore are not "disbursements." Under the Fair Campaign Practices Act, a "disbursement" "does not include payment by a county, municipality, school district, or other political subdivision for election-related expenses required or authorized by law."[52] The School District maintains that because it has a duty to inform voters about ballot measures and to expend a reasonable amount to do so, its expenditures on the brochure are authorized by Minnesota law and the financial reporting requirements do not apply. [53]

Finally, the School District asserts that because Section 211A is a criminal statute, violation of with is a misdemeanor,[54] it must be construed narrowly notwithstanding the civil nature of the proceedings before the panel of Administrative Law Judges.[55] According to the District, a narrow construction supports finding the word "promote" to mean express advocacy rather than the functional equivalent of express advocacy. The District maintains that requiring the advocacy to be express (e.g., "Vote Yes") provides a bright-line rule that gives school districts the clear guidance they need to carry out their responsibilities to fund public education and inform voters about ballot measures.

III. Analysis

Governing Statutes and Prior Decisions

Minnesota school districts are expressly authorized to raise the funds necessary to carry out their obligations of public education by issuing school building bonds for the "acquisition or betterment of school facilities."[56] Before such bonds may be issued, however, a school district is required to obtain approval from the voting public, as such bonds will likely result in tax increases to homeowners in the district.[57]

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[50] *Id*.
[51] Aff. of M. Vargas, Ex. A.
[52] Minn. Stat. § 211A.01, subd. 6.
[53] *Abrahamson v. St. Louis Cnty Sch. Dist*., 802 N.W.2d 393, 400-03 (Minn. Ct. App. 2011); Op. Att'y Gen. 159a-3, at 3-5 (May 24, 1966).
[54] Minn. Stat. § 211A.11.
[55] *See In the Matter of the Contest of General Election [Graves v. Meland],* 264 N.W.2d 401, 403 (Minn. 1978).
[56] Minn. Stat. §§ 475.52, subd. 5; 123B.02, subd. 8.
[57] Minn. Stat. § 475.58; 126C.17, subd. 9.

Minnesota law also imposes upon school districts an obligation to inform the public of their financial conditions, of official proceedings, and of district business.[58] Inherent in the requirement to obtain voter approval of a bond initiative and the mandated transparency for school districts established in law, is the duty to inform the public about a bond referendum; the stated need for such action; and the impact and effects of the passage or non-passage of a ballot question.[59]

Where a School District goes beyond informing the public about a bond referendum, however, and "acts to promote or defeat a ballot question," it meets the definition of a "committee" for purposes of campaign financial reporting requirements.[60]

Both parties have indicated that this matter is appropriate for summary disposition on the issue of whether the School District promoted the 2011 levy referendum ballot questions through its brochure and, if it did, whether it was required to file campaign finance reports in accordance with Minn. Stat. § 211A.02.

The Complainants maintain that the School District's brochure is indisputably promotional based on its phrasing of positive and negative outcomes and the lack of "opposing viewpoints." The only facts presented in the brochure that the Complainants dispute concern the School District's statement that state funding for schools has increased on average only 1 percent per year over the past 10 years. Because the District obtained this information directly from data published by the Department of Education and the Minnesota House of Representatives Research Department,[61] the panel concludes that any dispute regarding the average state funding for schools is not material to the ultimate determination as to whether the School District's brochure was promotional and does not necessitate a hearing on this matter. Instead, the lone issue as to whether the brochure is promotional may be determined by the panel as a matter of law.

Several recent cases interpreting the application of campaign finance reporting requirements to school districts and municipalities provide guidance in this matter. In *Abrahamson v. St. Louis County School District*,[62] the Minnesota Supreme Court considered whether the St. Louis County school district promoted a ballot question in articles and statements published in the school district's monthly newsletters. The Court defined the term "promote," for purposes of Minn. Stat. ch. 211A, according to its common usage as meaning "to urge the adoption of" or "advocate."[63] The Court did not narrowly construe the term to mean only express advocacy.

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[58] *See e.g.,* Minn. Stat. § 123B.10 (requiring a school board to annually notify the public of its revenue, expenditures, fund balances, and "other relevant budget information"); Minn. Stat. § 123B.09, subds. 10 and 11 (requiring school districts to "adequately inform the public" of meetings and official proceedings); and Minn. Stat. § 13D.01 (mandating that all meetings of a school board be open to the public).
[59] *See Abrahamson v. St. Louis County Sch. Dist*. (Findings of Fact, Conclusions and Order) OAH 65-0325-21677 at 27 (May 30, 2014).
[60] *Abrahamson,* 819 N.W.2d at 134-35.
[61] Second Aff. of M. Vargas, Exs. C, D; Aff. Katherine Swenson, Exs., D, E.
[62] *Abrahamson*, 819 N.W.2d 129 (Minn. 2012).
[63] *Id.*at 136, quoting *American Heritage Dictionary* 1410 (5th ed. 2011).

In analyzing whether the school district promoted the levy referendum in *Abrahamson*, the Minnesota Supreme Court noted that the district's materials included statements that if the referendum was defeated, taxes would "most likely still increase," that defeat of the referendum would lead to district dissolution "as an inevitable consequence," and that defeat of the referendum would "put[] every school in the district at the risk of closure."[64] The Court noted further that the materials also discussed the numerous ways in which the additional funding would benefit the educational opportunities available to the District's students.[65]

The Court ultimately concluded that the complaint sufficiently alleged a prima facie claim that the school districts' statements were promotional and remanded the alleged 211A reporting violations to the OAH for hearing.[66] The Court emphasized, however, that whether the panel of Administrative Law Judges would ultimately find that these statements were promotional would depend on the evidence presented at the evidentiary hearing.[67]

On remand to the OAH, the panel of three Administrative Law Judges ultimately concluded in *Abrahamson* that the school district had promoted the ballot question. The panel found that "by stressing only exaggerated benefits of a 'yes' vote and then describing only the most extreme negative possibilities of a 'no' vote"[68] the district advocated for the passage of the ballot question. In reaching its decision, the panel emphasized the school district had relied upon outdated budget data that misrepresented the district's financial condition; had exaggerated effects of a 'no' vote, including the likelihood that the district would enter into statutory operating debt and would be required to dissolve; and it had unfairly presented the true costs associated with approval of the referendum.[69]

However, the *Abrahamson* panel cautioned that promotion is "substantially more than merely informing the public about the financial condition of the district or the determined need for the issuance of bonds."[70] The panel indicated that promotion is also more than explaining the school board's rationale for seeking additional bond financing, and the consequences if a bond initiative is not passed.[71] According to the *Abrahamson* panel, statements may be considered promotional if they are "so one-sided that they cannot reasonably be read to mean anything but urging the passage of the referendum."[72]

In another recent decision, *Trehus v. City of Lino Lakes*,[73] a panel of Administrative Law Judges decided that a municipality's brochure concerning a

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[64] *Id*.
[65] *Id*.
[66] *Abrahamson v. St. Louis County, Sch. Dist*., 819 N.W.2d 129 at 136 (Minn. 2012).
[67] *Id*.
[68] *Abrahamson*, OAH 65-0325-21677 at 31.
[69] *Id*. at 29.
[70] *Id*. at 28.
[71] *Id*.
[72] *Id*.
[73] OAH 48-0325-31026 (Findings of Fact, Conclusions and Order) (April 24, 2014).

proposed charter amendment was promotional. The panel in that case concluded that statements by the city that the proposed amended charter process would "expand public involvement" and "provide additional protections" when, in fact, the amended process significantly decreased the time and opportunity for residents to file objections, put an overly positive spin on the process and rendered the city's information promotional.[74] The panel determined that the "average reader" would view the city's brochure, taken as a whole, as advocating for passage of the proposed charter amendment.[75]

Anoka Hennepin School District's Brochure

In analyzing the School District's brochure, this panel will employ the same test adopted by the *Abrahamson* panel, which has been referred to as the "functional equivalent of express advocacy" test. That is, the panel will find the brochure to be promotional only if it susceptible to no reasonable interpretation other than urging the passage of the referendum.[76]

The School District's brochure lists various outcomes in the event the ballot questions pass or fail. Other than disputing the School District's statement regarding the average annual increase in state funding, the Complainants do not allege that any of the outcomes identified by the District were inaccurate or exaggerated. Instead, the Complainants contend that the mere listing (and highlighting in bold) of positive and negative outcomes in the brochure renders the brochure one-sided and promotional. The Complainants also maintain that specific statements in the brochure were subjective rather than factual, such as stating that budget cuts would require "sacrificing or at least compromising cherished and long-time assumptions about what are necessary components of a good education," and asserting that, should the referendums fail, "students and staff will continue to be frustrated with unreliable and inefficient computers for daily work." The Complainants maintain that these statements, along with the list of outcomes and lack of "opposing views," render the brochure promotional.

The District's somewhat subjective statements regarding "sacrificing" or "compromising cherished assumptions" and students' "frustration" with inefficient technology, if viewed in isolation, may come close to crossing over the line into promotion. The panel finds, however, that, when viewed in its entirety, the brochure is not so one-sided that it can only reasonably be read as urging passage of the levy referendums.

Instead, when taken as a whole, the brochure is factual and informative and does not cross over the line into advocating for passage of the levy referendums. The fact

[74] *Id*. at 19.
[75] *Id*.
[76] *Abrahamson*, OAH 65-0325-21677 at 28; *See also*, *Fed. Election Comm'n v. Wisc. Right to Life, Inc*., 551 U.S. 449, 465 (2007) (political advertisements are functional equivalent of express advocacy only if advertisement is susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate).

that failure to renew a levy that brings in approximately $48 million annually to the School District would necessitate corresponding budget cuts resulting in staff layoffs, larger class sizes, and reduced after-school activities is simply an economic reality. Informing voters of this reality and the fact that many would perceive these outcomes to be negative, does not render the School District's conduct promotional. School districts have a responsibility to inform voters of the consequences that may result from a ballot question election. Contrary to the Complainants' argument, there is no requirement that the School District present opposing views. So long as the information prepared and distributed by a school district is factual and accurate, it should not be found to be a "committee" promoting a ballot question and subject to campaign finance reporting requirements.

In this case, unlike the situations presented in *Abrahamson*[77] and *Trehus,*[78] there is no claim or facts to support a finding that the School District misrepresented its financial condition, greatly exaggerated the negative effects of a "no" vote, or presented inaccurate information in order to urge passage of the ballot questions. The panel is also not persuaded that the image of a checked box next to the phrase "Vote November 8," is an exhortation to vote in favor of the ballot questions.

After careful consideration of the record and arguments in this matter, the panel concludes that the Complainants have failed to establish that the School District promoted the ballot questions through its brochure and acted as a "committee" within the meaning of the campaign finance reporting requirements under Minn. Stat. ch. 211A. There are no genuine issues of material fact remaining for hearing, and the School District has shown that it is entitled to prevail in this matter as a matter of law.

Accordingly, the panel grants summary disposition in favor of the School District. The complaint is dismissed.[79]

S.M.M., S.B., J.K.

[77] *Abrahamson*, OAH 65-0325-21677 (Findings of Fact, Conclusions and Order) (May 30, 2014).
[78] *Trehus* OAH 48-0325-31026. (Findings of Fact, Conclusions and Order) (April 24, 2014).
[79] Given this decision, the panel need not address whether the District's expenditures were exempt from the definition of "disbursement" or the reporting requirements of chapter 211A.